STATE OF MICHIGAN

IN THE SUPREME COURT

ALI BAZZI,

Plaintiff-Appellant,

-and-

GENEX PHYSICAL THERAPY, INC. and ELITE CHIROPRACTIC CENTER, PC,
Intervening Plaintiffs-Appellants,
and

TRANSMEDIC, LLC.

Intervening Plaintiff,

-vs-

SENTINEL INSURANCE COMPANY,

Defendant/Third Party Plaintiff-Appellee,
and

CITIZENS INSURANCE COMPANY,

Defendant
-vs-

HALA BAYDOUN BAZZI and MARIAM BAZZI,

Third-Party Defendants.

Supreme Court Docket No. _____

Court of Appeals Docket No. 320518

Wayne County Circuit Court Case No. 13-000659-NF

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PLAINTIFF-APPELLANT, ALI BAZZI, AND INTERVENING PLAINTIFFS-APPELLANTS, GENEX PHYSICAL THERAPY, INC, AND ELITE CHIROPRACTIC CENTER, PC'S, APPLICATION FOR LEAVE TO APPEAL

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BASIS OF JURISDICTION OF THE SUPREME COURT AND STATEMENT REGARDING ORDERS APPEALED FROM AND THE RELIEF SOUGHT

This is an Application for Leave to Appeal from:

a) the June 14, 2016 Opinion of the Michigan Court of Appeals, reversing the trial court's denial of summary disposition to Defendant/Third Party Plaintiff-Appellee, Sentinel Insurance Company ("Defendant"); and

b) Order denying Appellants' Motion for Reconsideration, entered by the Court of Appeals on August 5, 2016 (collectively attached as ***Exhibit 1***).

Plaintiff-Appellant, Ali Bazzi, and Intervening Plaintiffs-Appellants, Genex Physical Therapy, Inc, and Elite Chiropractic Center, PC (collectively, "Plaintiffs"), make this Application for Leave to Appeal pursuant to MCR 7.305, and have filed the Application on September 16, 2016. *See,* MCR 7.305(C)(2). Jurisdiction of this Court is based upon MCR 7.303(B)(1) ("review by appeal a case…after decision by the Court of Appeals").

On the basis of the arguments set forth below, Plaintiffs request that this Honorable Court grant their Application for Leave to Appeal and submit that Court of Appeals' respective opinion and orders should be vacated and the matter remanded to the trial court for further proceedings consistent with the denial of Defendant's Motion for Summary Disposition.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT DETERMINED THAT THIS COURT'S OPINION IN *TITAN INS CO v HYTEN* ABROGATED THE INNOCENT THIRD PARTY RULE EVEN IN THE CONTEXT OF STATUTORILY MANDATED INSURANCE BENEFITS?

The Plaintiff-Appellant and Intervening Plaintiffs-Appellants answer, "**Yes.**"

The Defendant/Third Party Plaintiff-Appellant answers, "**No.**"

The Court of Appeals answers, "**No.**"

II. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT EFFECTIVELY DETERMINED RESCISSION—AN EQUITABLE REMEDY—WOULD BAR AN INNOCENT THIRD PARTY'S CLAIM WITHOUT FIRST BALANCING THE EQUITIES BETWEEN BLAMELESS PARTIES TO DETERMINE WHO SHOULD ASSUME A LOSS?

The Plaintiff-Appellant and Intervening Plaintiffs-Appellants answer, "**Yes.**"

The Defendant/Third Party Plaintiff-Appellant answers, "**No.**"

The Court of Appeals answers, "**No.**"

III. DOES THE COURT OF APPEALS' DECISION CONTRAVENE THE PUBLIC POLICY UNDERLYING MICHIGAN'S NO-FAULT ACT, WHICH IS INTENDED TO PROVIDE VICTIMS OF AUTOMOBILE ACCIDENTS ASSURED, ADEQUATE, AND PROMPT REPARATION FOR CERTAIN ECONOMIC LOSSES AT THE LOWEST COST TO THE INDIVIDUAL AND THE NO-FAULT SYSTEM?

The Plaintiff-Appellant and Intervening Plaintiffs-Appellants answer, "**Yes.**"

The Defendant/Third Party Plaintiff-Appellant answers, "**No.**"

The Court of Appeals answers, "**No.**"

GROUNDS FOR REVIEW

The issue of whether the innocent third party rule (particularly as it relates to statutorily mandated insurance benefits) survives this Honorable Court's ruling in *Titan Insurance Company v Hyten*, 491 Mich App 547; 817 NW2d 562 (2012) involves a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3). This reality is plainly demonstrated by the Michigan Court of Appeals' more recent opinion in *Southeast Michigan Surgical Hosp, LLC v Allstate Ins Co,* Docket No. 323425,___ Mich App ___; ___ NW2d ___ (Aug 9, 2016), where it declared a conflict with this case in order to obtain further review of the issue. Unfortunately, the majority of the judges polled declined to convene a special panel on August 31, 2016; however, that does not minimize the significance of the issue.

Until this case, appellate courts considering statutorily mandated coverage and whether a policy could be rescinded on the basis of fraud to preclude such coverage for an innocent third party or innocent coinsured routinely determined that it could not. In fact, this opinion conflicts with those issued in *Morgan v Cincinnati Ins Co,* 411 Mich 267, 276-277; 307 NW2d 53(1981) and *Williams v Auto Club Group Ins Co,* 224 Mich App 313; 569 NW2d 403 (1997), among others. In *Morgan, supra,* and *Williams, supra,* this Court and the Court of Appeals determined that a statutory fraud exclusion cannot be relied upon to void statutorily mandated fire insurance coverage to an innocent coinsured. Therefore, review also is mandated under MCR 7.305(B)(5)(b).

Moreover, the decision in this is case is clearly erroneous and will cause material injustice, warranting review under MCR 7.305(B)(5)(a). Precluding no-fault insurance benefits to innocent third parties, based on no wrongdoing of their own, subverts the public policy underlying Michigan's No-Fault Act, which is intended to provide victims of automobile accidents assured, adequate, and prompt reparation for certain economic losses at the lowest cost

to the individual and the no-fault system. ***If*** there is a "remedy" for innocent third parties given the Court of Appeals' determination (but, see MCL 500.3145(1), which may be a bar depending on when fraudulent conduct in the procurement of a policy is discovered), it ultimately falls to the Michigan Assigned Claim Plan at considerable expense, which is, then, passed on to the motorists of this state. Review of this case is warranted, and Plaintiffs respectfully request that the Court grant their Application.

CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This action arises out of an automobile accident that occurred on August 8, 2012. Specifically, Plaintiff Bazzi was driving himself and a friend to a bakery in Dearborn Heights, operating a 2012 Honda Civic when it occurred. (A.Bazzi Dep. Tr. at pp. 14-15, ***Exhibit 2***). It is undisputed that the Civic was owned by his mother, Hala Baydoun Bazzi, and Plaintiff had permission to drive it. It is further undisputed that Ms. Bazzi insured the Civic under a policy of insurance with Defendant, and Mimo Investment, LLC, was listed as the insured on the policy. (Policy Schedule of Covered Autos, ***Exhibit 3***). Plaintiff sustained injuries in the accident and treated with medical providers, including Genex Physical Therapy, Inc, and Elite Chiropractic Center, PC.

Plaintiff commenced this action in the Wayne County Circuit Court on January 14, 2013, seeking payment of various personal protection insurance ("PIP") benefits from Defendant Sentinel and Defendant Citizens Insurance Company, which had received a claim through the Michigan Assigned Claims Plan. (Complaint, Wayne County No.13-000659-NF). The trial court permitted Genex Physical Therapy, Inc. and Elite Chiropractic Center, P.C. to intervene in the action to seek recovery of allowable expenses under MCL 500.3107(1)(a) that had been incurred in connection with the treatment rendered to Plaintiff by those facilities.

Subsequently, Defendant filed a Third-Party Complaint on May 2, 2013 against Hala Bazzi, and Mariam Bazzi, seeking rescission of the insurance policy based on allegations of fraud and material misrepresentations in procuring the policy. (Third Party Complaint, ***Exhibit 4***). Ultimately, on September 19, 2013, the trial court entered a default judgment against Hala Bazzi on the issue of liability and rescinded the Mimo Investment, LLC policy of insurance. (9/19/13 Order, ***Exhibit 5***) It did not address Miriam Bazzi. *Id.*

Based on the September 9, 2013 Order, Defendant filed a Motion for Summary

Disposition on October 18, 2013, in which it relied on *Titan Insurance Company v Hyten*, 491 Mich App 547; 817 NW2d 562 (2012), seeking dismissal of Plaintiff's action and asserting that *Hyten* eliminated the innocent third party rule. Plaintiff, his medical providers, and Defendant Citizens opposed the Motion, particularly asserting the facts in *Hyten* differed drastically from this case and disagreeing that the third party rule had been eliminated in the context of mandatory insurance benefits. The trial court denied the Motion on February 20, 2014. (2/20/14 Order, ***Exhibit 6***).

Defendant filed an Application for Leave to Appeal with the Michigan Court of Appeals. Ultimately, the Court considered the matter on direction from this Honorable Court. Specifically, on October 28, 2014, it remanded the case to the Court of Appeals for consideration of Defendant's Application for Leave to Appeal as on leave granted. (10/28/14 Order, ***Exhibit 7***).

On June 14, 2016, the Court of Appeals issued its two-to-one decision, reversing the trial court's denial of Sentinel's Motion for Summary Disposition. It wrote, "[w]e are asked in this case to determine whether the so-called "innocent third party" rule which this Court established in *State Farm Mut Auto Ins Co v Kurylowicz*, survived our Supreme Court's decision in *Titan Ins Co v Hyten.* We conclude that it did not. [Slip op. at p. 2 (Sawyer, P.J.) (footnotes omitted), ***Exhibit 1***]. The Court that *Kurylowicz* had previously precluded rescission of a policy for fraud in the application of insurance when the fraud was "easily discoverable" and the claimant was an innocent third party.[1] According to the Court of Appeals, when this Honorable Court rejected the "easily ascertainable" rule, it also rejected the "innocent third party" rule. *Id.* at 4. It further concluded:

[1] Notably, *Kurylowicz* did not involve the recovery of statutorily mandated no-fault benefits as the claims accrued prior to enactment of the No-Fault Act. *Id.* at 573.

> Thus, the question is not whether PIP benefits are mandated by statute but whether that statute prohibits the insurer from availing itself of the defense of fraud. And none of the parties identify a provision in the no-fault act itself where the Legislature statutorily restricts the use of the defense of fraud with respect to PIP benefits. *Id.* at p. 5.

Finally, the Court wrote:

> (1) there is no distinction between an 'easily ascertainable rule' and an 'innocent third-party rule,' (2) the Supreme Court in Titan clearly held that fraud is an available defense to an insurance contract except to the extent that the Legislature has restricted that defense by statute, (3) the Legislature has not done so with respect to PIP benefits under the no-fault act, and, therefore (4) the judicially created innocent third-party rule has not survived the Supreme Court's decision in Titan. [*Id.* at 10].

It then remanded the matter to the trial court, instructing as follows:

> On remand, there are two questions before the trial court: first, whether the default judgment against Hala and Mariam Bazzi conclusively establishes fraud, and therefore provides a basis for Sentinel to rescind the policy as to all parties, or whether the remaining parties are entitled to litigate the issue of fraud and, second, whether there is a genuine issue of material fact regarding the fraud issue. If the trial court determines either of those questions in favor of Sentinel, it shall enter summary disposition in favor of Sentinel. [*Id.* at 9].

Plaintiffs timely filed a Motion for Reconsideration of the Court of Appeals' opinion on July 5, 2016. It denied the Motion on August 5, 2016. (8/5/16 Order, ***Exhibit 1***). Plaintiffs now appeal to this Honorable Court for review of these determinations.

STANDARD OF REVIEW

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a cause of action. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255; 654 NW2d 646, 648 (2002); see also *de Sanchez v State*, 467 Mich 231, 235; 651 NW2d

59 (2002) and *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper only where the court is convinced that there are no genuine issues of material fact in dispute between the parties, and it is virtually impossible for the non-moving party's claim to be supported at trial. *Candeleria v BC General Contractors Inc*, 252 Mich App 681, 686; 653 NW2d 630 (2002). *See also American Bumper & Mfg Co v Transtechnology Corp*, 252 Mich App 340, 347; 652 NW2d 252 (2002) and *Devine v Al's Lounge, Inc*, 181 Mich App 117, 118-119; 448 NW2d 725 (1989) ("[s]summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency that cannot be overcome").

Pursuant to MCR 2.116(G)(4), the moving party under MCR 2.116(C)(10) "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." Non-movants must come forward with specific affidavits, deposition testimony, or other admissible evidence showing a genuinely contested issue of material fact for trial. *Sprague v Farmers Ins Exchange*, 251 Mich App 260, 264; 650 NW2d 374 (2002); see also *Rice v Auto Club Ins Assn*, 252 Mich App 25, 31; 651 NW2d 188 (2002) and *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The Michigan Supreme Court has held, "a genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Courts are liberal in finding a factual dispute sufficient to withstand summary disposition. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009).

This Honorable Court employs de novo review of a lower court's determination regarding summary disposition. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486

Mich 311,317; 783 NW2d 695 (2010). Additionally, interpretation of statutes involve a question of law, which the Court also reviews de novo. *Eggleston v Bio-Med Applications of Detroit, Inc,* 468 Mich 457, 464; 703 NW2d 23 (2005).

LAW AND ARGUMENT

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED THAT THIS COURT'S OPINION IN *TITAN INS CO v HYTEN* ABROGATED THE INNOCENT THIRD PARTY RULE IN THE CONTEXT OF STATUTORILY MANDATED INSURANCE BENEFITS

In *Titan Ins Co v Hyten,* 491 Mich 547; 817 NW2d 562 (2012), this Honorable Court considered whether an insurance carrier may rely on the equitable remedy of fraud committed in the application for insurance to avoid liability for ***optional*** insurance coverage in circumstances where (1) the fraud was easily ascertainable, and (2) the claimant was a third party, innocent of the fraud. *Id.* at 550. It determined that, regardless of whether the fraud was easily ascertainable or not, a policy can be rescinded to void ***optional*** insurance coverages. *Id.* at 550-551, 573. However, the ***mandatory*** **insurance coverages required by statute** ***remained intact*** **for the innocent third party to attempt to recover.** Specifically, the policy at issue "provided personal protection insurance coverage for bodily injury of $100,000 per person/$300,000 per occurrence" (*Id.* at 552), and even the defendant did not attempt to argue that innocent third party could not recover the minimum mandatory coverages available by statute. The Court specifically noted:

> Titan did not seek to completely avoid liability under the insurance policy. Rather, Titan sought a declaration that it was not obligated to indemnify Hyten for any amounts *above* the minimum liability coverage limits required by the financial responsibility act ($20,000 per person/$40,000 per occurrence), MCL 257.501 *et seq.*, for which Titan acknowledged responsibility. [*Id.*, n2 (emphasis in original)].

Significantly, the Michigan No-Fault Insurance Act is a comprehensive legislative enactment designed to regulate the insurance of motor vehicles in this state and the payment of benefits resulting from accidents involving those motor vehicles. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 595; 648 NW2d 591 (2002). It is ***compulsory*** insurance that every Michigan motorist is to purchase to operate a vehicle legally in this state, and the insurance benefits available under the statute are a substitute for injured individuals' common-law remedies in tort. *Id.* MCL 500.3101 provides in relevant part:

> (1) The owner or registrant of a motor vehicle required to be registered in this state **shall** maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect. [Emphasis added].

MCL 500.3101a provides that, upon obtaining that coverage:

> (1) Except as otherwise provided in this section, an insurer, in conjunction with the issuance of an automobile insurance policy, as defined in section 3303, shall provide 2 certificates of insurance for each insured vehicle. The insurer shall mark 1 of the certificates as the secretary of state's copy, which copy, except as otherwise provided in this section, shall be filed with the secretary of state by the policyholder upon application for a vehicle registration. The secretary of state shall not maintain the certificate of insurance received under this subsection on file. [Emphasis added].

The No-Fault Act additionally states that the scope of the residual liability insurance required under MCL 500.3101 is ***equivalent*** to that which is required under the financial

responsibility laws "of the place in which the injury or damage occurs." Specifically, MCL 500.3131(1) provides:

> Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. **This insurance *shall* afford coverage *equivalent to that required* as evidence of automobile liability insurance *under the financial responsibility laws* of the place in which the injury or damage occurs**. In this state this insurance shall afford coverage for automobile liability retained by section 3135. [Emphasis added.]

Therefore, under this statute, the scope of residual liability insurance is determined by the financial responsibility laws of the place where the injury occurs. *Kleit v Saad*, 153 Mich App 52, 56; 395 NW2d 8 (1985). In this case, since the accident occurred in Michigan, Michigan's financial responsibility law provides:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) **The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs**; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; **no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy**, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor. [*Kleit*, 153 Mich App at 56, quoting MCL § 257.520(f)(1) and following Michigan's financial responsibility since the accident occurred in Michigan (italics omitted; bold and underline added)].

Therefore, the liability of the carrier becomes absolute with respect to mandatory

insurance coverage when injury to an innocent third party occurs, and "no statement made by the insured or on his behalf…shall defeat or void said policy." MCL 250.520(f)(1).

It does not appear that the Court considered MCL 500.3101, MCL 500.3131, or other similar no-fault provisions when rendering its decision in *Hyten, supra*—those statues were not germane to its discussion. The Court of Appeals referenced them; however, it dismissively stated, "And under MCL 500.3131 and MCL 500.3009, the minimum limits are similar to that required under the financial responsibility act. But, unlike the provisions of the financial responsibility act, none of those statues restrict the availability of the fraud defense." (Slip op. at p. 7). Significantly, the Court of Appeals' characterization is incorrect as MCL 500.3131 incorporates MCL 257.520(f)(1). *See also, Kleit*, 153 Mich App at 56, quoting MCL § 257.520(f)(1).

"The Legislature is presumed to know of statutory interpretations by the Court of Appeals and this Court." *Longstreth v Gensel*, 423 Mich 675, 691; 377 NW2d 804 (1985), citing *SEMTA v Dep't of Treasury*, 122 Mich App 92, 103; 333 NW2d 14 (1982); *Jeruzal v Wayne County Drain Comm'r*, 350 Mich 527, 534; 87 NW2d 122 (1957). Significantly, both this Honorable Court and the Court of Appeals have repeatedly refused to permit insurers to deny statutorily mandated coverage to innocent insureds. This remains true even in the face of a statutory fraud provision that voids coverage for statutorily mandated benefits.

Like compulsory no-fault insurance, fire coverage offered in this state must conform to certain minimum statutory requirements. Before January 1, 1992, all fire insurance policies issued in this state were required to, minimally, include and conform to the standard language set

forth in MCL 500.2832 (the "165 lines").[2] That statute included the following fraud exclusion:

> This ***entire*** policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud of false swearing by the insured relating thereto. [*Id.* (emphasis added)].

Interpreting that language, this Court repeatedly determined that it does not void coverage to an "innocent coinsured". *See, e.g., Morgan v Cincinnati Ins Co,* 411 Mich 267, 276-277; 307 NW2d 53(1981). In *Morgan,* the Court determined that, despite stating, "[t]his ***entire*** policy shall be void…" (MCL 500.2832 (emphasis added)), the statutory fraud exclusion must be read to bar only the claim of the insured who committed the fraud and not that of an innocent coinsured. *Id.* at 277. The Court reached a similar finding in *Borman v State Farm Fire and Casualty Co,* 446 Mich 482, 489; 521 NW2d 266 (1994).[3]

Effective January 1, 1992, the Legislature repealed MCL 500.2832 and replaced it with MCL 500.2833, which directs:

> Except as otherwise provided in this act, each fire insurance policy issued or delivered in this state pursuant to subsection (1) shall contain, at a minimum, the coverage provided in the standard fire policy under former section 2832. [MCL 500.2833(2)].

The statute also includes a revised fraud exclusion that directs, "…the policy may be void on the basis of misrepresentation, fraud, or concealment." MCL 500.2833(1) and MCL 500.2833(1)(c). In *Williams v Auto Club Group Ins Co,* 224 Mich App 313; 569 NW2d 403

[2] Notably, MCL 500.2832 was repealed by 1990 PA 305, effective January 1, 1992, but was replaced with MCL 500.2833, which, as discussed in greater detail, *infra,* also contains a fraud exclusion.

[3] The policy exclusion at issue in *Borman, supra,* stated, "If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss." *Id.* at 486.

(1997), the Court of Appeals considered this new statutory language and determined that the rights of innocent coinsureds remained intact, regardless of fraud committed by another. *Id.* at 318 (when "…enacting §2833, the Legislature did not intend to permit insurers to preclude recovery to innocent co-insureds).

Notwithstanding the existence of the statutory fraud provision and the Michigan appellate courts' protection of the rights of an innocent coinsured", the Legislature has not modified MCL 500.2833 in any respect to exclude innocent insureds from recovery of benefits. Similarly, the Legislature has made no modification to MCL 257.520(f)(1), MCL 500.3131, or otherwise enacted a new provision of the No-Fault Act to prohibit an innocent third party from recovering statutorily mandated PIP benefits when an insured has committed fraud in the application for insurance.

In either the legislative process that led to the enactment of MCL 500.2833 or that has resulted in numerous amendments to the No-Fault Act, including P.A. 2014, No. 492, which became effective on January 13, 2015, the Legislature could have easily addressed innocent third parties and innocent coinsured and prohibited them from even recovering statutorily mandated insurance benefits. However, it did not. There is no indication, therefore, that the Legislature intended the sea change that this case purports to create. *See, Longstreth*, 423 Mich at 691.

The Court of Appeals incorrectly determined that the innocent third party rule has been abrogated in the context of statutorily-mandated coverage, and its opinion in this case should be vacated.

II. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT EFFECTIVELY DETERMINED RESCISSION—AN EQUITABLE REMEDY—WOULD BAR AN INNOCENT THIRD PARTY'S CLAIM WITHOUT FIRST REQUIRING THE BALANCING OF EQUITIES BETWEEN BLAMELESS PARTIES TO DETERMINE WHO SHOULD ASSUME A LOSS

As noted above, the Court of Appeals instructed as follows regarding the remand of this action:

> On remand, there are two questions before the trial court: first, whether the default judgment against Hala and Mariam Bazzi conclusively establishes fraud, and therefore provides a basis for Sentinel to rescind the policy as to all parties, or whether the remaining parties are entitled to litigate the issue of fraud and, second, whether there is a genuine issue of material fact regarding the fraud issue. If the trial court determines either of those questions in favor of Sentinel, it shall enter summary disposition in favor of Sentinel. [Slip op. at p. 9 (Sawyer, P.J.), ***Exhibit 1***].[4]

However, even if the default judgment in this case operates to establish fraud in the procurement of the policy as against all parties, it does not necessarily follow that rescission is automatic as to all parties. What the Court of Appeals' discussion lacks is the fundamental recognition that rescission is an equitable claim that is subject to equitable defenses. The Court of Appeals, however, ostensibly concludes that any evidence of fraud or misrepresentation under any circumstances will justify an insurer to completely rescind coverage. This is simply not how equity works. As this Honorable Court previously instructed in *Kavanau v Fry*, 273 Mich 166, 171; 262 NW 763 (1935):

> "An application to a court of equity for the rescission, cancellation, or delivering up of agreements and securities is not founded on an absolute right, as in case of an action at law on a contract or in tort, but is rather an appeal to the sound discretion of the court, which in granting or refusing the relief prayed acts on its own notions of

[4] The Court of Appeals acknowledged that "it seems likely that the trial court will rule in Sentinel's favor regarding whether there is a genuine issue of material fact on the issue of fraud" but did not definitively resolve it, instead remanding for the trial court to do so. *Id.* at n28.

> what is reasonable and just under all the surrounding circumstances." [*Id.*, quoting 9 C.J. p. 1161].[5]

More recently, this Court explained:

> Equity jurisprudence "'mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life.'" *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959) (citation omitted). While legislative action that provides an adequate remedy by statute precludes equitable relief, the absence of such action does not. This is so because "[e]very equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." 30A CJS, Equity, § 93, at 289 (1992). Equity allows "complete justice" to be done in a case by "adapt[ing] its judgment[s] to the special circumstances of the case." 27A Am Jur 2d, Equity, § 2, at 520-521. [*Tkachik v Mandeville*, 487 Mich 38, 45-46; 790 NW2d 260 (2010)].

Rescission is an equitable remedy which is granted only in the sound discretion of the trial court. *Harris v Axline*, 323 Mich 585; 36 NW2d 154 (1949); *Hathaway v Hudson*, 256 Mich 694; 239 NW 859 (1932). A court need not grant rescission in every case, and, particularly where two parties are "equally innocent" (like an innocent third party and an innocent insurer), a court must exercise its equitable powers to determine which blameless party should assume the loss. *Lenawee County Bd of Health v Messerly*, 417 Mich 17, 31-32; 331 NW2d 203 (1982). Moreover, the trial court is not limited to the "polar opposites" of complete rescission or full enforcement of coverage. Specifically, this Court recognized in *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981):

> The defenses of innocent misrepresentation and silent fraud are not based in law but in equity. The equitable court awarding a remedy must look to the most just result. Therefore, should the court on remand find there was innocent misrepresentation or silent fraud it

[5] Though Michigan has abolished the procedural distinctions between law and equity, the substantive differences remain. *Barke v Grand Mobile Homes Sales, Inc*, 6 Mich App 386; 149 NW2d 236 (1967), quoting 11A Callaghan's Michigan Pleading and Practice, § 85.03, page 67.

> must decide which remedy would be the most equitable under the unique circumstances of the case. The court is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined. We leave the resolution of the proper remedy, if any, to the court below.

Given this direction, an innocent third party's claim cannot be categorically dismissed merely based on the conclusion that the insured committed fraud. Assuming that the innocent third-party rule does not apply to statutorily mandated benefits, the trial court is left with an equitable claim for rescission involving two innocent parties, and the trial court must exercise its equitable powers to fashion an appropriate remedy in light of the particular circumstances.

Significantly, when fashioning such a remedy, laches, perhaps, may be the most significant equitable defense that must be considered in response to an insurer's equitable claim for rescission in actions involving PIP benefits. This Court explained the doctrine of laches as:

> …"the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust." Laches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time. Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. [*Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982), quoting Walsh, Equity, Sec. 102, p. 472 (citations omitted).

The effect of an insurer's rescission based on the Court of Appeals' rationale is that no insurance applies to the individual's injury. Ordinarily, he would be entitled to benefits through the Michigan Assigned Claims Plan ("MACP"), but only if he had notified the MACP within a year of the accident. *See,* MCL 500.3172(1); MCL 500.3174. *See also,* MCL 500.3145(1). However, in many instances, the individual could not possibly have provided the requisite notice considering that allegations of fraud frequently arise during litigation and well-after the one-year

anniversary of the automobile accident. Consequently, an injured person, who by all accounts should have been entitled to PIP benefits under the No-Fault Act, is now precluded from obtaining any benefits whatsoever. Underscoring this Court's directive in *Lothian,* laches concerns the effect of delay and the resulting prejudice. There could not possibly be more prejudice to an injured individual than permitting rescission as to his PIP benefits when he would be left without any no-fault coverage whatsoever. This is one of many facts that must be taken into account when balancing the equities and determining whether rescission is valid against an injured individual, regardless of whether fraud has been conclusively established.

The Court of Appeals effectively instructs in its opinion that that the only relevant question is whether fraud occurred, and, if so, the insurer is then automatically entitled to rescission. Such a simplistic analysis, however, is inaccurate and inconsistent with this state's long history of equitable jurisprudence. Minimally, this Honorable Court should grant leave to clarify that, before an insurer may disavow coverage, courts must weigh and balance against one another the equities of the insurer's rescission claim with all appropriate equitable defenses to that claim.

III. THE COURT OF APPEALS' DECISION CONTRAVENES THE PUBLIC POLICY UNDERLYING MICHIGAN'S NO-FAULT ACT, WHICH IS INTENDED TO PROVIDE VICTIMS OF AUTOMOBILE ACCIDENTS ASSURED, ADEQUATE, AND PROMPT REPARATION FOR CERTAIN ECONOMIC LOSSES AT THE LOWEST COST TO THE INDIVIDUAL AND THE NO-FAULT SYSTEM.

The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. *Shavers v Kelley,* 402 Mich 554, 578; 267 NW2d 72 (1978). The goal of the no-fault insurance system is

to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses at the lowest cost to both the individual and the no-fault system. *Id.* at 578-579; *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). *See also, Spencer v Citizens Ins Co*, 239 Mich App 291, 307–08; 608 NW2d 113 (2000) ("[t]he Legislature intended the no-fault act to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses"). The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. *Shavers*, 402 Mich at 579. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort. *Id.*

The Court of Appeals' opinion in this case is wholly inconstant with those legislative goals and the public policy behind them. Without examination and consideration by this Honorable Court, the opinion will produce inequitable results, such as leaving individuals, who are innocent of any wrongdoing and are not chargeable with any fault of their own, ***without any insurance coverage whatsoever***. As noted above, an individual ordinarily would be entitled to benefits through the MACP, but only if he had notified the MACP within a year of the accident. *See*, MCL 500.3172(1); MCL 500.3174. *See also*, MCL 500.3145(1). Yet, in many instances, the individual could not have provided the requisite notice considering that allegations of fraud frequently arise during litigation and well-after the one-year anniversary of the automobile accident. Consequently, an injured person, who by all accounts should have been entitled to ***assured*** and ***prompt*** PIP benefits under the No-Fault Act, is now precluded from obtaining any benefits whatsoever.

Alternatively, the only option to protect individuals' rights and abilities to obtain what is promised under the no-fault system of compulsory insurance (assured, adequate, and prompt reparation for certain economic losses) is excessively burdensome to the system itself and stands to drastically increase the costs for no-fault insurance charged to motorists throughout the state. In ***every*** case where an individual seeks no-fault benefits under a policy that is not his own, he must automatically file a claim with the MACP, in addition to the no-fault insurer, just to protect the notice requirements of MCL 500.3145 and MCL 500.3173 in the remote chance that the no-fault insurer may attempt to rescind the policy. Under Michigan law, the MACP is supposed to be the insurer of last resort. *See*, MCL 500.3114; MCL 500.3172. *See also, Gutierrez v Dairyland Ins Co*, 110 Mich App 126, 132; 312 NW2d 181 (1981), reversed on other grounds, *Gutierrez v Dairyland Ins Co of Michigan*, 414 Mich 956; 327 NW2d 253 (1982) ("the assigned claims insurer is only liable if there is no other personal protection insurance applicable to the injury, no other applicable insurance can be identified, or such other insurance is not available in a sufficient amount"). However, the Court of Appeals' opinion prioritizes notifying the MACP and submitting documentation consistent with MCL 500.3145(1) so that, if ever needed, the individual has a source to obtain assured, adequate, and prompt benefits from. And, this reality of addressing and maintaining this influx of claims does not come without a cost to motorists throughout this state.

Significantly, the total cost for operation of the MACP is assessed to every insurance carrier that writes business in the State of Michigan and those carriers are directed by ***compulsory*** language to build the assessment that they pay to the MACP into the cost of the premium that they charge their insured. MCL 500.3171(1) specifically directs, "[c]osts incurred

in the operation of the facility and the plan shall be allocated fairly among insurers and self-insurers". Further, MCL 500.3176 requires:

> **Reasonable costs incurred in the handling and disposition of assigned claims**, including amounts paid pursuant to assessments under section 3171, ***shall be taken into account in making and regulating rates for automobile liability and personal protection insurance.*** [Emphasis added].

The unintended, yet certain and burdensome, consequences of the Court of Appeals' opinion contravene the express purposes of the No-Fault Act and the public policy behind it. This alone compels review by this Honorable Court, and Plaintiffs' Application should be granted to allow it the opportunity to do so.

RELIEF REQUESTED

Therefore, based upon the foregoing argument and analysis, Plaintiff-Appellant, Ali Bazzi, and Intervening Plaintiffs-Appellants, Genex Physical Therapy, Inc, and Elite Chiropractic Center, PC, respectfully request that this Honorable Court schedule argument on their Application for Leave to Appeal pursuant to MCR 7.305(H)(1) and/or grant the Application, permitting this matter to continue as a calendar case, as well as award them all other relief to which they are entitled.

Respectfully submitted,

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Dated: September 16, 2016

CERTIFICATE OF SERVICE

Stacey L. Heinonen, being duly sworn, deposes and says that she is employed by the Mike Morse Law Firm, attorneys for Plaintiff-Appellant and Intervening Plaintiffs-Appellants and that on September 16, 2016, she served a copy of the foregoing Application for Leave to Appeal upon all counsel of record, via the Court's True Filing system and first class mail at their above, respective addresses. Additionally, on September 16, 2016, a Notice of Filing Application was also served on the clerk of the Court of Appeals via the Court's True Filing system, as well as the clerk of the Wayne County Circuit Court via that Court's electronic filing system.

BY: /s/ Stacey L.Heinonen
STACEY L. HEINONEN